No. 7776.

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellant,*

v.

CARL F. NOBLE,

*Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

# Brief for the Appellant


WILL G. BEARDSLEE,
*Director, Bureau of War Risk Litigation.*

KEITH L. SEEGMILLER,
*Attorney, Department of Justice.*

JOHN B. TANSIL,
*United States Attorney.*

R. LEWIS BROWN,
*Assistant United States Attorney.*

FRANCIS J. McGAN,
*Attorney, Department of Justice.*





OATES & ROBERTS, PRINTERS

# INDEX



## CITATIONS

*CASES*:

## INDEX

No. 7776.

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellant,*

vs.

CARL F. NOBLE,

*Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

## BRIEF FOR THE APPELLANT

## STATEMENT OF THE CASE.

Carl F. Noble, appellee, hereinafter called plaintiff, brought suit against the United States of America, hereinafter called defendant, on a contract of yearly renewable term insurance in the sum of $10,000. The Complaint (R. 2-6) alleged maturity of the contract by total permanent disability on July 30, 1919, as a result of "certain diseases and disabilities" contracted and "injuries" suffered by plaintiff during his military service.

The Answer (R. 8-9) joined issue on the allegation of total permanent disability within the life of the policy. The case came on for jury trial on October 29, 1934.

Though plaintiff testified that during his period of service covering nearly two years, he suffered for various short periods from nausea, mumps, and the effects of poison gas and influenza, these statements were not corroborated by his service records. Plaintiff, himself, stated that he performed duty regularly except for four or five days when he had influenza. When discharged from service he listed as his only disability defective hearing in one ear and certified that he knew of no other injury or disease from which he was suffering. Comparable certification as to plaintiff's health was made by his immediate commanding officer and an examining physician. Upon leaving the service he returned directly to his prewar occupation of farming on a tract of over 400 acres, and, with the exception of digitalis taken upon the advice of a druggist for eighteen months prior to June, 1922, and an operation for appendicitis in the summer of 1922, he sought no medical attention until the spring of 1923. Witnesses for plaintiff testified that until 1922, he did seeding and disking on the farm, repaired machinery, cooked, and hauled grain to and from town, but in their opinion he had done no "manual labor," and that after 1922 he had done no work. Plaintiff testified, however, that from 1922 until 1933, the farming activities had been done by hired help under his "supervision" (R. 57, 59, 126); that his crops had been better than those of any of his neighbors, and

that his production had been fair except during 1932 and 1933, in each of which years he harvested only about 850 bushels of wheat. He produced 5300 bushels in 1923, and between that date and 1930, he made bank deposits of over $22,000.

A detailed summary of the evidence is set out hereinafter at pages 11 to 17.

During the course of the trial one of plaintiff's experts was permitted, over timely objection and exception, to express an opinion that plaintiff had been totally permanently disabled from the date of his discharge. (R. 194-195.) At the close of all of the evidence defendant moved for a directed verdict on the ground that there was no substantial evidence that plaintiff became totally permanently disabled while his policy was in force and to the Court's denial of this motion an exception was duly noted. (R. 263-264.) Thereafter, verdict (R. 285) and judgment (R. 11-13) for the plaintiff were entered, awarding disability benefits from July 30, 1919. Defendant's petition for appeal (R. 327) and assignment of errors (R. 290-326) were duly filed and appeal allowed. (R. 329.)

## QUESTIONS PRESENTED.

### I.

Whether the Court erred in permitting plaintiff's expert witness to express an opinion that plaintiff was totally permanently disabled on July 30, 1919.

### II.

Whether there was any substantial evidence that

plaintiff was totally permanently disabled on July 30, 1919.

## ASSIGNMENT OF ERRORS.

Defendant relies upon six of its assigned errors as follows:

### VII.

The Court erred in overruling defendant's objection to the following question asked of the witness, Dr. Alred, by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

Q. (Facts assumed (R. 300-307) omitted here.) * * * state whether or not the plaintiff, Carl Noble, was or was not in your opinion totally and permanently disabled on the date of his discharge from the army, July 30, 1919.

MR. BALDWIN: We object to that as incompetent, irrelevant and immaterial, and not justified by the record in this case, and as being an improper statement as to what constitutes permanent and total disability. Permanent and total disability at law means this, and this only: any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. That the supposed definition of total and permanent disability read by counsel into the question is used in the argument of the Supreme Court of the United States, and not from the statement of any definite rule.

On the further ground that there are included in the question matters not shown by any proof in the case, and there are omitted from the question material matters which might reasonably change the

conclusion of the expert, if stated to him, which do appear from the records in this case.

THE COURT: Overrule the objection.

MR. BALDWIN: I will ask an exception.

A. Taking those as facts and your definition, he was undoubtedly totally and permanently disabled at the time of discharge. He was undoubtedly totally and permanently disabled if those be true facts in following your definition.

Q. And at what time ?

A. At the time of discharge. (R. 300-308.)

XI.

The Court erred in overruling the motion made by the defendant at the close of all the evidence for a directed verdict in its favor, to which action of the Court defendant then and there duly excepted as follows:

MR. BALDWIN: The defendant now moves that the Court direct a verdict in its favor on the grounds stated on its motion for a directed verdict made at the conclusion of the plaintiff's case. I assume that the record may likewise show that the grounds stated then are as given, and not reported.

MR. MOLUMBY: Yes, it is so stipulated.

MR. BALDWIN: And I wish to add to that, that plaintiff has wholly failed to prove a total disability, or a permanent disability within the time fixed by his pleadings in this case. On the further ground that the evidence in this case is insufficient to and does not tend to prove the necessary allegations of the pleadings. And on an added ground that it appears that the claim made relates to a period later than, and entirely without the limits fixed by the plaintiff's case.

THE COURT: The motion will be denied.

MR. BALDWIN: I ask an exception at this time to each of the rulings of the Court. The ruling denying the motion to dismiss, and the ruling

denying the motion for a directed verdict, and we would like ninety days from today, by an order entered on the minutes, within which to prepare, serve and file our Bill of Exceptions. (R. 311-312.)

XII.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

"Defendant's requested instruction No. 1. You are instructed to find your verdict for the defendant in this case."

To which action of the Court defendant then and there duly objected and excepted as follows:

MR. BALDWIN: The defendant objects and excepts to the refusal of the court to give its requested instruction No. 1. (R. 312.)

XXIV.

The evidence is insufficient to justify the verdict. (R. 325.)

XXVII.

When measured by the rules of law as stated by the Court in its charge to the jury the evidence in this case does not justify and is insufficient to support the verdict rendered in this case. (R. 325.)

XXX.

The Court erred in refusing to enter judgment in favor of the defendant as requested by it at the close of the testimony, to which action of the Court defendant duly excepted. (R. 326.)

## PERTINENT STATUTES AND REGULATIONS.

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or total permanent disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, * * *

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

## POINTS AND AUTHORITIES.

### I.

The Court erred in permitting plaintiff's expert to express an opinion that plaintiff became totally permanently disabled on July 30, 1919.

*United States* v. *White* (C. C. A. 9th) decided May 20, 1935;

*United States* v. *Spaulding*, 293 U. S. 499;

*United States* v. *Stephens*, 73 F. (2d) 695 (C. C. A. 9th);

*United States* v. *Sullivan*, 74 F. (2d) 799 (C. C. A. 9th);

*Harris* v. *United States*, 70 F. (2d) 889 (C. C. A. 4th);

*United States* v. *Provost*, 75 F. (2d) 190 (C. C. A. 5th);

*Hamilton* v. *United States*, 73 F. (2d) 357 (C. C. A. 5th);
*Gray* v. *United States*, 76 F. (2d) 233 (C. C. A. 8th);
*United States* v. *Steadman*, 73 F. (2d) 706 (C. C. A. 10th).

II.

There was no substantial evidence that plaintiff became totally permanently disabled on July 30, 1919.

A.

Plaintiff did not meet the requisite burden of showing by positive, non-speculative evidence that during the life of his contract he became both totally and permanently disabled to pursue any substantially gainful occupation.

*Lumbra* v. *United States*, 290 U. S. 551;
*United States* v. *Baker*, 73 F. (2d) 691 (C. C. A. 9th);
*Deadrich* v. *United States* 74 F. (2d) 619 (C. C. A. 9th);
*United States* v. *Jones*, 74 F. (2d) 986 (C. C. A. 5th);
*United States* v. *Krueger*, (C. C. A. 7th) decided April 2, 1935;
*United States* v. *Mintz*, 73 F. (2d) 457 (C. C. A. 5th).

B.

The allegation of total permanent disability is conclusively refuted by

(1) Plaintiff's continuous pursuit of a substantially gainful occupation.

*United States* v. *Luckinbill*, 65 F. (2d) 1000 (C. C. A. 10th);

*United States* v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
*United States* v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);
*United States* v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th);
*United States* v. *Burns,* 69 F. (2d) 636 (C. C. A. 5th).

(2) The fact that for a period of more than ten years the plaintiff, with the advice and co-operation of other of his relatives and friends, pursued a general course of life entirely inconsistent with the existence of total permanent disability from the date of his discharge.

*Lumbra* v. *United States, supra*;
*United States* v. *Spaulding, supra*;
*Miller* v. *United States,* Supreme Court, decided March 4, 1935;
*Deadrich* v. *United States, supra*;
*United States* v. *Baker, supra*;
*Harrison* v. *United States,* 42 F. (2d) 736 (C. C. A. 10th);
*United States* v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th);
*United States* v. *Russian,* 73 F. (2d) 363 (C. C. A. 3rd).

## ARGUMENT.

### I.

### THE COURT ERRED IN PERMITTING THE PLAINTIFF'S EXPERT TO EXPRESS AN OPINION THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED ON JULY 30, 1919.

It has become well established that an expert should

not be permitted to express an opinion upon the exact point for jury determination, and with specific reference to war risk insurance suits "the experts ought not to have been asked or allowed to state their conclusions on the whole case."

*United States* v. *Spaulding, supra.*

This principle has been recognized and applied by this court in the case of *United States* v. *White, supra,* wherein, though such an opinion was admitted in evidence, no objection was made thereto and the admission of said opinion was not assigned as error. This Court stated that

> However, in view of recent ruling of this and other courts (*United States* v. *Stephens* (C. C. A. 9), 73 F. (2d) 695, and cases cited; *United States* v. *Sullivan* (C. C. A. 9), 74 F. (2d) 799; *United States* v. *Buege* (C. C. A. 9), 74 F. (2d) 1021; *United States* v. *Provost* (C. C. A. 5), 75 F. (2d) 190; *United States* v. *Spaulding,* 293 U. S. 499. 55 S. Ct. 273, 79 L. Ed.....), that it is error to allow medical experts to state their opinions as to the total and permanent disability of an insured in an action on a war risk insurance policy for the reason that such testimony invades the province of the jury to determine for itself the ultimate and controlling issue of permanent and total disability, we must treat the admission of such evidence in this case as a plain error not assigned.

Additional authorities have been cited heretofore in support of this proposition.

It seems apparent that Dr. Alred should not have been permitted to express an opinion that plaintiff was totally and permanently disabled on July 30, 1919, and

that the admission of such opinion constitutes reversible error, particularly in view of the fact that timely objection and exception were noted and the question preserved by appropriate assignment of error.

## II.

## THERE IS NO SUBSTANTIAL EVIDENCE THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED ON JULY 30, 1919.

Review of the record will not only reveal an absence of any positive, non-speculative evidence of the alleged total permanent disability, but will also reveal that for more than ten years plaintiff pursued a substantially gainful occupation and a general course of living which conclusively refute such an allegation.

### SUMMARY OF THE EVIDENCE.

At the age of twenty-nine (R. 46) plaintiff left his occupation of farming to enlist in the United States Army on September 17, 1917, and remained in the military service until honorably discharged therefrom on July 30, 1919. (R. 62.) Lay testimony for the plaintiff that he had been physically strong prior to service (R. 147) was corroborated by the reports of physical examinations for enlistment. (R. 214-215.) Other lay evidence for the plaintiff, consisting primarily of his own testimony, was to the effect that while en route from the place of his enlistment in the State of Washington to Camp Green, North Carolina, he experienced a few days of nausea, diarrhea, and vomitting (R. 34); that at Camp Green he had the mumps that "went down" (R. 38, 67-68); that after a short stay at Camp

Green he was sent to Hoboken, New Jersey, from whence he embarked for France; that he was sick during the voyage (R. 40); that though he had a gas mask he did not use it and was gassed twice while in France (R. 42-43, 69); that on one occasion a bomb exploded near him destroying part of the wagon on which he was riding and causing the horses to run away, as a result of which, however, plaintiff suffered no physical injury (R. 70); that he had influenza in December, 1918, while in Germany with the Army of Occupation (R. 44, 71); and that he appeared to be nervous while he was in France. (R. 72, 110.) Plaintiff testified that he repeatedly reported his illnesses, particularly the mumps, to army medical officers, but as they could find nothing wrong with him he was always returned to duty (R. 38, 67, 68) which he performed regularly during his entire period of service (R. 34, 38, 83-85, 117) except for four or five days when he was confined to his bed because of influenza. (R. 44.) The records of the Adjutant General's office reveal no sickness or injury suffered by the plaintiff during his period of service, with the exception of slight deafness in one ear noted at the time of discharge. (R. 62-63, 208-220).

Though plaintiff testified that after his attack of influenza he was short of breath and became fatigued quickly (R. 45) he signed a statement at the time of his discharge that, excepting the deafness, which he specifically mentioned, he knew of no injury or disease from which he was suffering. (R. 216.) His immediate commanding officer (R. 218) and a physician who

examined him (R. 217) certified to the same effect concerning the plaintiff's health.

Plaintiff and other lay witnesses testified that when he returned home in the summer of 1919, he was nervous and short of breath, pale and erratic in the movement of his hands. (R. 47, 118-120, 123, 128.) There was also lay testimony that during service plaintiff's hair had turned completely white (R. 150) and that when he returned home the veins in his neck would sometimes throb. (R. 45.) However, he immediately reengaged in his prewar occupation of farming and commenced actively to assist with the farm work. (R. 53.)

The farm consisted of approximately 860 acres, 400 of which were owned by plaintiff, the balance being owned by plaintiff's brother with whom plaintiff farmed on a partnership basis. About 320 acres of the land were under cultivation and fourteen or fifteen head of cattle were kept on the farm. (R. 56.) One of plaintiff's witnesses testified that such a farm usually requires the help of more than one man and sometimes as many as six men. (R. 90-92.) In 1921 the plaintiff and his brother dissolved their partnership and plaintiff assumed the responsibility of operating his own farm. (R. 51.) Though the work was practically done in the fall of 1919 (R. 174) plaintiff did some plowing which caused his muscles to become temporarily contracted and occasioned "restless nights and troubled dreams." (R. 47.) With reference to the spring of 1920 the following is quoted from plaintiff's testimony:

Q. What work were you able to do that spring, if any?

A. I done plowing and seeding, but no manual work. He (plaintiff's brother) done the heavy work.

Q. Were you able to do the heavy work?

A. I was sick that spring and I didn't get started until two weeks after he was working.

Q. How often would your work be interrupted by sickness that spring?

A. It wasn't interrupted much after I got started. I had these here pains in my chest and dizzy spells, palpitation, and was weak, and I started to work and quit and rested up again and went at it and after about two weeks I went ahead and we finished putting in the crop. (R. 48.)

It further appears from the lay testimony for plaintiff that in 1920 he was occupied with such work as cooking, bringing in the wood, milking the cows, repairing equipment which the hired man or brother could not repair (R. 75), hauling wheat to town and bringing back groceries and implements (R. 92), and seeding and disking. (R. 175.) It was also a part of plaintiff's evidence that in the spring of 1922 he "did some of the work toward putting in the crop" though "he was sick in the spring and laid off some," (R. 178), but that at that time he seeded forty or fifty acres of land. (R. 53.)

Prior to service plaintiff handled his farm alone because he had neither teams nor machinery with which hired help could work. (R. 50-51.) After service he had both horses and equipment sufficient for two complete outfits and could therefore employ additional help.

(R. 58.) In 1921, he reduced his cultivated acreage by half, but produced a larger crop with less work because of an improved system of farming. (R. 53.) Plaintiff testified that since 1922 he had helped some around the house but had done no farm work. (R. 53.) From that date until the spring of 1933, he continued to live on his farm and has had the work done under his "supervision," (R. 57) he "directing the operations." (R. 59.) Plaintiff further testified that until about 1930, his average production was "away ahead" of that of his neighbors (R. 59), and that in 1923 he had produced 5300 bushels of wheat which was worth $1 per bushel. (R. 57.) He stated that his crops had been fair except for the last two years (1932 and 1933) in each of which he had harvested only about 850 bushels. (R. 57.) After 1920 plaintiff purchased approximately 250 additional acres of land (R. 58) and for the seven-year period from 1923 to 1930 his account in one bank showed deposits of $22,081.23. (R. 261.)

In 1928 plaintiff was married to a trained nurse who had attended him in a professional capacity and was fully aware of the state of his health. (R. 165.)

Several of plaintiff's lay witnesses expressed opinions that since discharge he had continued to get worse. (R. 73-74, 125, 129-130.) Plaintiff consulted no doctor until June, 1922, (R. 60) though for eighteen months prior thereto he had been taking digitalis upon the advice of a druggist (R. 119, 120) and medical attention was sought at that time only because the druggist though plaintiff had appendicitis. (R. 60.) Though

the record does not show definitely the diagnosis or treatment in June, 1922, it may fairly be inferred that the treatment consisted of an operation for appendicitis. (R. 55, 186.) It appears that plaintiff had no further medical examination or treatment until February, 1923, at which time Dr. Porter, who examined him in connection with a claim for compensation (R. 55) found valvular heart disease and considered plaintiff to be very nervous because he (plaintiff) was afraid he was going to die. (R. 25.) Dr. Porter testified to an opinion that at the time of the examination the prognosis was unfavorable; that plaintiff would continue to get worse (R. 29); and that he was totally disabled at the time of the examination. (R. 194.)

Pursuant to the advice of Dr. Porter (R. 55) plaintiff applied to the Government for treatment and spent about six weeks in a Veterans' Bureau hospital at Helena in the spring of 1923. From February, 1924 until about April, 1925 he was in the Aberdeen Hospital at St. Paul, after which he received no hospitalization until the spring of 1931, when he was again under treatment at Helena for about six weeks. Thereafter, he was treated in the hospital for a few weeks in the spring of 1932 and again in 1933. (R. 54.)

Plaintiff testified that in addition to the above he had received treatment from Dr. Attix and Dr. Wallin, but the time, extent and nature of their treatment is not disclosed. (R. 55.)

Dr. Alred testified for plaintiff that he had examined him a few days prior to trial, at which time the follow-

ing diagnosis was made: "anemia, nephritis, chronic; myocarditis, hypertension arterial sclerosis and psychoneurosis; atrophy of the legs from disuse; enlarged prostate." In answer to a long hypothetical question, Dr. Alred was permitted, over defendant's objection and exception, to express an opinion that plaintiff was totally permanently disabled as of July 30, 1919. (R. 194.) This witness further testified that plaintiff's condition as described in the hypothetical question should have been treated in 1919 (R. 228); that the use of digitalis for eighteen months could have affected adversely the nerve control of the heart (R. 227); and that digitalis should be taken only upon advice of a physician who has knowledge of the entire physical condition of the patient. (R. 226.)

## ANALYSIS OF THE EVIDENCE.

Taking as literally true all facts testified to on behalf of the plaintiff and disregarding for the moment other evidence which refutes the alleged total permanent disability, he has established only that during the life of his policy he became nervous, short of breath, pale, and erratic in the movements of his hands, and that his hair turned white, as a result of all of which he became partially incapacitated by a disability which may or may not have been permanent. The plaintiff's witnesses testified that he was not able to do the heaviest of the farm work. Yet until 1922, he was able to do disking, seeding, cooking, repairing of machinery, milking of cows, and hauling of grain and supplies to and from town, in addition to supervising his farm work generally. This

falls short of showing a total disability even though "he could not work as long each day as he otherwise would in order to perform the work which was available" or even though "he had to rest frequently and work relatively short hours."

*United States* v. *Baker,* 73 F. (2d) 691, 695 (C. A. 9th).

In fact it has become well established that a disability which merely precludes a person from engaging in strenuous labor or even light labor for long hours is not a total disability.

*Lumbra* v. *United States,* 290 U. S. 551;
*Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
*United States* v. *Jones,* 74 F. (2d) 986 (C. C. A. 5th);
*United States* v. *Mintz,* 73 F. (2d) 457 (C. C. A. 5th);
*United States* v. *Kreuger,* (C. C. A. 7th) decided April 2, 1935.

Furthermore, no attempt was made to show that plaintiff could not have engaged in some occupation other than farming. His policy protected against inability to engage in *any* substantially gainful occupation. (Cf. *Miller* v. *United States,* (Supreme Court) decided March 4, 1935; *United States* v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th).

There is no evidence that any disability, assuming that plaintiff was disabled in July, 1919, was then permanent. Any inference of permanency which might be drawn from the fact that his condition later became both permanent and total is refuted by his failure for

nearly four years to receive competent medical attention,

*Eggen* v. *United States,* 58 F. (2d) 616 (C. C. A. 8th);

And Cf

*Deadrich* v. *United States, supra*;

*United States* v. *Townsend,* 73 F. (2d) 310 (C. C. A. 4th).

and his ill-advised and unregulated taking of digitalis for eighteen months.

In addition to plaintiff's failure to prove his case positively, his allegation of total permanent disability is conclusively refuted.

It appears that until 1933, he was continuously engaged in a substantially gainful occupation, even though he could not do all the work on the farm,

Cf. *United States* v. *Burns,* 69 F. (2d) 636 (C. C. A. 5th);

and

*United States* v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);

and was assisted with the work by others,

Cf. *United States* v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th);

and even though subsequent to 1922, he was able only, according to his own testimony, to "supervise" the farming activities.

Cf. *United States* v. *Luckinbill,* 65 F. (2d) 1000 (C. C. A. 10th);

and

*United States* v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th).

It seems apparent that for some twelve years after the date upon which total permanent disability is now alleged to have arisen neither plaintiff nor his associates thought his condition was serious as of the date of his discharge. His army medical record covering nearly two years showed no disability of any consequence and at the time of his discharge, he, his commanding officer, and examining physician, certified that none existed. Cf. *United States* v. *Baker, supra; Deadrich* v. *United States, supra*; and *Harrison* v. *United States,* 42 F. (2d) 736 (C. C. A. 10th). The correctness of these certifications is strongly supported by the fact that he did not seek medical advice or treatment for the condition now relied upon until 1923, and a druggist who observed him regularly did not advise medical treatment until appendicitis was indicated in 1922. Furthermore, the doctors who treated him in 1922 were neither called to testify nor their absence explained. It does not appear that they advised him to take treatment for any other condition, and it may fairly be inferred that no other disability of consequence was noted at that time.

As late as 1928 he assumed the responsibilities of marriage and rearing a family. What is more, his wife is a trained nurse who had professional knowledge of the state of his health. Cf. *United States* v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th); *United States* v. *Russian,* 73 F. (2d) 363 (C. C. A. 3rd).

Finally, plaintiff made no claim for benefits under his insurance contract until nearly thirteen years after the date upon which he now alleges total permanent disab-

ility. He offered no explanation for this long delay and this alone is to be taken as strong evidence against the merits of his case.

*Lumbra v. United States, supra*;
*United States* v. *Spaulding, supra*;
*Miller* v. *United States, supra.*

## CONCLUSION.

It is respectfully submitted that the trial court erred as heretofore assigned and that the judgment of said court should be reversed.

WILL G. BEARDSLEE,
*Director, Bureau of War Risk Litigation.*

R. LEWIS BROWN,
*Assistant United States Attorney.*

KEITH L. SEEGMILLER,
*Attorney, Department of Justice.*

FRANCIS J. MCGAN,
*Attorney, Department of Justice.*

JOHN B. TANSIL,
*United States Attorney.*